Supreme Court of the United States

OCTOBER TERM, 1942.

No. 300.

HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE LOOMIS, as Trustees for The New York, New Haven and Hartford Railroad Company,

Petitioners,

—against—

HOWARD F. HOFFMAN, individually and as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased,

Respondent.

BRIEF ON BEHALF OF PETITIONERS.

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Of Counsel.

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—against—

HOWARD F. HOFFMAN, individually and as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased,

Respondent.

BRIEF ON BEHALF OF PETITIONERS.

I.

Opinions of the Courts Below.

There was no opinion of the District Court. The majority and minority opinions, original and amended, of the Circuit Court of Appeals for the Second Circuit are reported in 129 F. (2d) 976 (R. 441-489).

II.

Jurisdiction of This Court.

This Court granted petitioners' application for a writ of certiorari on October 12, 1942, —— U. S. ——, 87 L. ed. Advance Opinions 31 (R. 489).

III.

Statement of the Case.

The complaint alleges that on December 25, 1940, at about 6:15 P. M., while the plaintiff (hereinafter referred to as respondent), Howard F. Hoffman, was driving a Ford coupe at a grade-crossing in West Stockbridge, Massachusetts, the automobile was struck by a locomotive engine operated by the defendants (hereinafter referred to as petitioners), causing injuries to the respondent and the death of his wife, Inez Hoffman (R. 3, 4, 10). The jurisdiction of the United States District Court for the Eastern District of New York was based on diversity of citizenship (R. 3, 29).

The First Cause of Action, on behalf of Howard F. Hoffman, brought under a statute of Massachusetts, alleges petitioners were negligent in failing to ring a bell or blow a whistle on the engine (R. 5, 6). It also sets out that respondent reduced speed, thereafter did stop, look and listen, and did then proceed cautiously over the crossing, in compliance with another statute of Massachusetts (R. 5, 6).

The Second Cause of Action, also on behalf of Howard F. Hoffman, based on the common law, alleges, among other things, that petitioners were negligent in failing to ring a bell or blow a whistle, in failing to have a headlight on the rear end of the locomotive, and in operating the locomotive with its headlight away from the crossing (R. 7-9).

The Third and Fourth Causes of Action, brought by Howard F. Hoffman as administrator of the estate of Inez Hoffman, allege the same common law and statutory negligence claimed in the First and Second Causes of Action (R. 9-11).

The Fifth and Sixth Causes of Action were discontinued (R. 11-14, 29).

On the question of negligence the trial court submitted three issues to the jury—failure to ring a bell, to blow

a whistle, and to have a light burning on the front of the train (R. 382, 383, 385, 386). These issues were closely contested (R. 39, 74, 80, 85, 88, 98, 106, 118-120, 147, 170-171, 191-193, 195-196, 217, 221-222, 230-231, 234, 261-262, 264-266, 267, 275, 296-304, 320-321, 348-349, 356-358, 360, 363-366, 368, 378-379).

Judgment was entered in favor of the respondent, Howard F. Hoffman, individually, in the amount of $25,077.35, and in favor of Howard F. Hoffman, as administrator of the Estate of Inez Hoffman, in the amount of $9,000, on November 25, 1941 (R. 435, 436).

In the trial court, a statement of petitioners' engineer, who had died prior to the trial (R. 239), was offered in evidence under 28 U. S. C. §695 (Act of June 20, 1936, c. 640, §1, 49 Stat. 1561; Defendants' Exhibit J for Identification, R. 431-435). Petitioners offered to prove that this statement was signed, using the words of the statute, in the regular course of any business, and that it was the regular course of such business to make such statement. The respondent objected to its introduction in evidence, and the court sustained the objection; granting an exception to the petitioners (R. 381, 382). The Circuit Court of Appeals held that even though the petitioners offered proof that the statement was made in the regular course of business and that it was the regular course of such business to make the statement, it was inadmissible (R. 461, 462).

In the trial court, respondent's witness, Laurence Bona, testified that he gave a signed statement to Mr. Diamond (respondent's attorney of record; R. 85, 86). The court ruled that if petitioners' attorney called for and inspected the statement, the door would be opened for the respondent to offer it in evidence, and if that were done the court would receive it (R. 107, 224). Petitioners' attorney declined to inspect the statement under such conditions (R. 107, 224). The Circuit Court of Appeals held unanimously that this was error, but the majority opinion

says that it was not reversible error because (1) as the statement was not in the record it was impossible to know whether it would have served for impeaching purposes, and whether such impeachment would have materially affected the jury's verdict; and because (2) it could not be said that the trial judge was unreasonable in relying upon *Edison Electric Light Co.* v. *United States Electric Lighting Co.*, 45 Fed. 55, 59 (C. C. S. D. N. Y., 1891) (R. 473, 474, 483). Respondent's attorney produced the statement, but made no objection to its inspection and no claim that it was irrelevant or a confidential communication (R. 107). Other witnesses called by the respondent had given signed statements to the respondent's attorney but these were not called for (R. 150, 183, 205).

The trial court charged that in the personal injury action the petitioners had the burden of proving contributory negligence (R. 387). Petitioners excepted to the charge, and to the failure to charge petitioners' request No. 16, that in the personal injury action, respondent had the burden of proving freedom from contributory negligence (R. 394, 395, 403). The Circuit Court of Appeals unanimously held that the charge on burden of proof was not erroneous (R. 475, 483).

IV.

Questions Presented.

(1) Whether the Circuit Court of Appeals improperly read into the Act of June 20, 1936, c. 640, §1, 49 Stat. 1561 (1936); 28 U. S. C. §695 (1940), a restriction which supported the trial court's exclusion of a stenographic report of the engineer's examination, offered by the petitioners, even though the statement was signed in the regular course of business and it was the regular course of business to make such statement.

(2) Whether the Circuit Court of Appeals improperly refused to treat as reversible error the denial of petitioners' admitted right to demand and inspect, without any condition attached, a statement made by respondent's witness, unless it appeared that the statement could be used for purposes of such successful impeachment as materially to affect the jury's verdict.

(3) Whether in diversity of citizenship cases the federal courts must follow conflict of laws rules as to burden of proof of contributory negligence prevailing in the states in which they sit, notwithstanding Federal Rule of Civil Procedure 8(c).

V.

Argument.

Summary of the Argument.

POINT I.

The Federal Statute, 49 Stat. 1561 (1936), 28 U. S. C. §695 (1940), makes admissible the report of petitioners' engineer.

A.

The Decision Is Contrary to the Terms of the Statute.

B.

The Decision Is Contrary to the Intent of the Statute, as Shown by Its Backround and Legislative History.

C.

The Decision Is Contrary to Authority.

POINT II.

Under the Federal Rules of Civil Procedure and under the Conformity Act, Rev. Stat. §914 (1875), 28 U. S. C. §724 (1940), it was reversible error to hold that, if petitioners' attorney inspected a statement made by respondent's witness, respondent could put the statement in evidence.

POINT III.

In the personal injury action the respondent had the burden of proving freedom from contributory negligence.

POINT I.

The Federal Statute, 49 Stat. 1561 (1936), 28 U. S. C. §695 (1940), makes admissible the report of petitioners' engineer.

Petitioners have given the circumstances under which the trial court sustained the objection to the introduction in evidence of Defendants' Exhibit J for Identification (*supra*, p. 3). This exhibit is a statement of engineer Harold D. McDermott made at an investigation held at the Pittsfield freight office of petitioners on December 27, 1940, two days after the accident (R. 431). McDermott was interviewed by assistant superintendent Cuineen and Mr. Christie of the Massachusetts Public Utilities Commission (R. 431, 434, 435). The statement is clearly relevant on the issues of negligence submitted to the jury—headlight, bell, and whistle.

The accident occurred on December 25, 1940, the statement was taken on December 27, 1940, the suit was started on July 18, 1941, and McDermott, the engineer, had died before the trial, held in November, 1941 (R. 4, 431, 1, 239).

The reasoning of the majority opinion by Judge Frank seems to be that the report was not admissible because it was not made in the "regular course of business"; that it was not made in the "regular course of business" because there was a motive to misrepresent; that no proof of the circumstances was possible to make trustworthiness a fact question for the jury; and that, therefore, it was not possible to treat the report as made in the "regular course of business".

The opinion says that the statement would be excluded under the common law rule because it does not come within the exceptions as to declarations by a deceased witness, and is not a memorandum in the regular course of business within the common law exception (R. 442-449), that is, the motive factor is here present, and the principle of circumstantial guarantee of trustworthiness is inherent in all exceptions to the hearsay rule (R. 446). The opinion then says that the report would be excluded under the federal statute (R. 449-475, 484-488). The statutory words "regular course of business" are words of art, with a settled meaning—"writings made in such a way as to afford some safeguards against the existence of any exceptionally strong bias or powerful motive to misrepresent" (R. 450, 451). The background and legislative history show that Congress did not intend to give to the phrase "regular course of business" any meaning which would do away with safeguards against a motive to misstate (R. 451-455, 484-488).

It is assumed throughout the opinion that the report was made "for use in probable litigation", to supply "evidence in a highly probable lawsuit", "is dripping with motivations to misrepresent", and is "an obviously motivated record" (R. 449, 461, 464). It is assumed that the "extent of the motivation here is so great as to preclude adequate trustworthiness", that "the primary purpose of the employer, obvious from the circumstances, in ordering those reports is to use them in litigation involving those accidents", and that "no proof, then, was possible

that he (engineer) did not have the peculiarly strong motive to misrepresent of the kind which, we hold, precludes its admission" (R. 465, 468).

Judge Clark is "much disturbed by the restriction here read into the remedial statute" (R. 476). He shows that to exclude the report reads into the statute a restriction directly opposed to its intent and plain terms, is contrary to its history and background, and to the views of Wigmore, Morgan, and the makers of the American Law Institute Code of Evidence (R. 476, 477). The decision sets aside the reasoning of several unanimous decisions of the Circuit Court of Appeals for the Second Circuit (R. 476). The restriction is not precise—it is impossible to tell whether it is based on a motive to misrepresent or an anticipated lawsuit (R. 478, 479). The restriction is against the trend of the times and shows a new technique of judicial legislation (R. 479-481).

For a thorough analysis of the *Hoffman* decision in regard to the effect of Section 695, petitioners call attention to Note (1942) 56 Harvard Law Review 458, entitled "*Hoffman v. Palmer: Admissibility at Common Law and under the Model Act of Business Records Made by a Third Party with Incentive to Misrepresent*", initialed by John M. Maguire, Professor in the Harvard Law School, Assistant Reporter of the Committee On Evidence of The American Law Institute.

A. The Decision Is Contrary to the Terms of the Statute.

Petitioners are of the opinion that Judge Clark is correct in treating the terms of the statute as plain and unambiguous. The statute reads as follows:

> "ADMISSIBILITY. In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transac-

> tion, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind." 49 Stat. 1561; 28 U. S. C. §695.

In spite of this language the opinion reads into the statute one restriction not expressed, and reads out of the statute a provision very clearly expressed.

In 1820 Chief Justice Marshall said:

> "Where there is no ambiguity in the words, there is no room for construction." *United States* v. *Wiltberger*, 5 Wheat. 76, 95, 96.

In 1867 Justice Swayne said:

> "If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction." *United States* v. *Hartwell*, 6 Wall. 385, 396.

Admitting that a clearly expressed legislative intention removes his common law test of trustworthiness, Judge Frank says that here there is no such expressed intention, and that, therefore, common law meanings must hold

(R. 450, 452). This method of statutory construction, what Judge Clark calls "a new technique of judicial legislation" (R. 480, 481), applied here, leads to illogical results. For example, contemporaneousness was expressly carried over into the statute. Judge Clark points out that other common law requirements—death or absence of the entrant; regular course of business, with duty owed to a third person; regularity of entry; no motive to misrepresent; a writing—would all be held part of the statute under this method, unless expressly excluded (R. 481).

Judge Frank gives no adequate explanation of the sentence "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility" (R. 455, 456). There should be no great difficulty in giving effect to this plain language. Professor Morgan has written that in the earlier cases dealing with hearsay the chief inquiry concerned itself with the necessity for use rather than elements of trustworthiness. "What, then, is the conclusion of the whole matter? The rationale of the exceptions to the rule excluding hearsay is that the circumstances of the utterance furnish reasonably adequate information for a satisfactory appraisal of its probative value, and there is a necessity for its use." Morgan, *The Relation Between Hearsay and Preserved Memory* (1927) 40 Harvard Law Review 712, 732.

The opinion does not recognize the possibility of truth in the engineer, or in his employers. It is possible that two days after the accident, when he gave the statement, the engineer did not anticipate a claim or lawsuit. Any weakness to tell an untruth might show itself at the trial rather than two days after the occurrence. The jury might not give great weight to a claimed motive of fear of litigation. Very few of the reported tort cases show the employee a co-defendant. The jury might

not be impressed with any claimed fear of loss of job for a claimed single act of negligence in 33 years of service, 22 years as an engineer (R. 431). The jury might conclude, in weighing the circumstances under which the statement was taken, that sometimes engineers do blow whistles for crossings and have headlights burning, even for their own protection. While McDermott could not be cross examined because dead, all the circumstances of his statement could be examined. It is likewise possible that petitioners themselves, as a guide to the future, wanted a truthful statement from their employee.

Throughout his opinion Judge Frank expresses a fear of lack of motive to speak the truth. In the first place, this was a question for the jury, rather than for the trial court. In the second place, the trial court refused to hear evidence as to the "circumstances" under which the statement was taken. In the third place, there are recognized safeguards against inaccuracy and untrustworthiness. It has been held that a reasonable safeguard is to leave "the records from which they (statements) are compiled freely at the disposal of the adverse party". *Northern Pac. Ry. Co.* v. *Keyes*, 91 Fed. 47, 59 (C. C. D. N. D. 1898). It has been held that entries prepared in the ordinary routine are warranted as to reliability. *Landay* v. *United States*, 108 F. (2d) 698, 704 (C. C. A. 6th, 1939), *cert. denied*, 309 U. S. 681 (1940).

The trial judge did not permit petitioners to prove that the engineer's statement was signed by him in the regular course of business and that it was the regular course of business to make such statement (R. 381, 435). This proof, if allowed, would have been subject to cross examination as to the "circumstances of the making", and to comment by the trial judge in his charge to the jury.

W. E. Christie, of the Massachusetts Public Utilities Commission, was present at the investigation (R. 431), and took part in the questioning (R. 434, 435). It was "a

dignified inquiry in the presence of a state official" (Note 1, R. 476, Judge Clark's Opinion). *See* Mass. Gen. Laws (1932) c. 159, §§27-29, which show the interest of the Commission in the investigation. Petitioners refer to Section 29 (set out in Appendix, *infra*, p. 34) as particularly applicable.

Safeguards against inaccuracy and untrustworthiness already appear as a matter of record. Petitioners should have been allowed to prove other "circumstances" so that the jury could determine the weight to be given to the statement. Judge Frank has an unreasonable fear of this procedure. "If the rules excluding relevant testimony tendered by competent witnesses had their origin in a supposed inferiority of jurors to judges, they need serious re-examination in this country." Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact* (1929) 43 Harvard Law Review 165, 191.

The majority opinion not only resorts to language construction where no ambiguity of language and no necessity exist, but construes the statute contrary to its express terms.

B. The Decision Is Contrary to the Intent of the Statute, as Shown by Its Background and Legislative History.

Hearsay Rule and its common law exceptions.

The common law recognized a necessity in the case of death, insanity, or absence from the jurisdiction, for hearsay proof of the activities of a large business. *The Spica*, 289 Fed. 436 (C. C. A. 2d, 1923). Some courts did not require proof that the original observer was unavailable, or that the entrant had personal knowledge, or even that the entrant was unavailable. *Chesapeake & O. Ry. Co.* v. *Stojanowski*, 191 Fed. 720 (C. C. A. 2d, 1911); *Massachusetts Bonding & Ins. Co.* v. *Norwich*

Pharmacal Co., 18 F. (2d) 934 (C. C. A. 2d, 1927). This indicated a trend but the liberalization was neither general nor uniform nor rapid. *See* Morgan & Maguire, *Looking Backward & Forward at Evidence* (1937) 50 Harvard Law Review 909, 921-922. Wigmore urged that it should be sufficient if books were verified on the stand by a supervising officer who knew them to be the books of regular entries kept in his establishment. 5 Wigmore, Evidence (3d ed. 1940) §1530. The Legal Research Committee of the Commonwealth Fund wrote:

> "A few courts only have accepted Mr. Wigmore's theory. They are growing in number, but the process of reaching this proper end by judicial decision is altogether too slow and uncertain." Morgan & others, The Law of Evidence: Some Proposals for Its Reform (1927) 51, 63.

The majority opinion relies upon a theory or technique of construction of the phrase "regular course of business", to the effect that it has a common law meaning which must be carried over into the statute. Among the circumstances of significance is the non-existence of a controversy in which the declarant has a personal interest, although, at times, Judge Frank seems to be willing to disregard immediacy of litigation (R. 444, 446, 461, 465). Another circumstance is motive to misrepresent. As to the first, this Court in *Rowland* v. *St. Louis & S. F. R. R. Co.*, 244 U. S. 106 (1917) set aside the objection to reports prepared by the railroad to determine the division of expense and income between state and interstate business. As to the second, Judge Clark points out that a general application of the test of "motive to misrepresent" would exclude all entries of past events, and a limited application would call for a subjective test, uncertain and unsatisfactory (R. 479).

In *Sullivan* v. *Minneapolis Street Ry. Co.*, 161 Minn. 45 (1924), the plaintiff claimed that she was injured by an

emergency stop while a passenger on defendant's street car. At the time defendant had a rule requiring every motorman to make a report at once on every emergency stop. Over plaintiff's objection defendant put in evidence the motorman's report made immediately after the accident and turned in before he knew any one claimed to have been injured. The opinion says that the report was pertinent and convincing, while recognizing that "the existence of the rule was perhaps for the purpose of getting the facts causing and surrounding an emergency stop so that they would be known and available if claim arose out of such stop" (p. 53). It is obvious that defendant's rule in the Minnesota case had in mind possible claims for injuries as the result of emergency stops. A jury might have given great or little weight to the report under the circumstances, but it was admitted for consideration by the jury.

The Model Act of 1927.

To speed the slow progress of the common law in respect of exceptions to the hearsay rule, and to remove confusion, the Committee of the Commonwealth Fund suggested the Model Act of 1927, followed in eight states.[1] *See* Morgan, *et al.*, Evidence, *supra*, 63. Wigmore had no thought of a restrictive interpretation of the Model Act. 5 Wigmore, Evidence, *supra*, §1530a. There is nothing from Morgan in support of restriction. Morgan *et al.*, Evidence, *supra*, 51-63.

The framers of the Model Act (later codified as 28 U. S. C. §695) considered as pertinent three of the exceptions to the hearsay rule—the shop-book doctrine, the

[1] Ala. Code 1940, tit. 7, §415; Conn. Gen. Stat., Supp. 1935, §1675e; Me. Laws, 1933, c. 59; Md. Ann. Code (Flack, 1939), art. 35, §68; Mass. Gen. Laws (1932) c. 233, §78; Mich. Comp. Laws (Mason Cum. Supp. 1940) §14297; N. Y. Civ. Pr. Act §374-a; and R. I. Gen. Laws Ann. (1938) c. 538, §1.

use of memoranda to revive memory or as records of past recollection, and the doctrine admitting entries made in the regular course of business. Morgan, *et al.*, Evidence, *supra*, 51 *et seq.* Judge Frank says that Section 695 has two objectives: (1) to make uniform the regular course of business exception to the hearsay rule in one respect only (where there is a regular system of making entries and the system is likely to ensure accuracy, it is not necessary to introduce the evidence of the entrants); and (2) to relax the common law requirements as to form of writing, broaden the definition of business, and possibly to remove the necessity of calling many witnesses (R. 454-456, 484, 487, 488). These objectives mentioned by Judge Frank are confined to "entries made in the regular course of business", and do not refer to the other two exceptions to the hearsay rule considered by the framers of the Model Act. It is not, therefore, reasonable to treat Section 695 as the codification of a single exception to the hearsay rule.

Legislative history of the Statute of 1936.

All this was the general background. Petitioners now come to the legislative history of the Act itself. Judge Frank amended his opinion to refer to the Report of the Senate Judiciary Committee in connection with the bill which became 28 U. S. C. §695 (R. 484-488). The Report consists of a letter from the Attorney General and a memorandum enclosed with the letter (R. 484). The Attorney General gave one reason, probably because it was of particular interest to his Department in the prosecution of criminal cases, for recommending passage—to secure uniformity in the federal courts as to proof of book entries without identification by the persons making them. He shows that the old common law rule had been modified in four circuit courts of appeals, many district courts, and in a number of state courts. Judge Clark

dismisses the argument of limited objective advanced by the majority opinion, in these words:

> "And Attorney General Cummings, in recommending the legislation to Congress, merely rehearsed this background without in any way suggesting the completely stultifying addition here made to the statute" (R. 488, 489).[2]

C. The Decision Is Contrary to Authority.

Cases under Section 695.

The federal courts have construed Section 695 with liberality. In *Hunter* v. *Derby Foods*, 110 F. (2d) 970 (C. C. A. 2d, 1940), plaintiff's intestate died after an illness of eight or nine hours. Plaintiff alleged that death was caused by eating canned meat prepared or distributed by defendant, and offered in evidence the death certificate signed by the coroner in the course of his official duty under the laws of Ohio. The opinion by Judge Patterson points out that although there was evidence tending to impeach the certificate, that went to the weight, and it was admissible under Section 695.

In *Ulm* v. *Moore-McCormack Lines*, 115 F. (2d) 492 (C. C. A. 2d, 1940), hospital records were held admissible without calling the doctors who made them. The difficulty of calling many witnesses was not involved. See same case on rehearing, 117 F. (2d) 222 (1941), *cert. denied*, 313 U. S. 567 (1941). Also Note (1941) 11 Brooklyn Law Review 78-89.

In *United States* v. *Mortimer*, 118 F. (2d) 266 (C. C. A. 2d, 1941), *cert. denied*, 314 U. S. 616 (1941), the trial

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[2] Other Committee Reports on the bill were substantially identical. There was no debate in Congress. 80 Cong. Rec. 3412, 3468, 4243, 4884, 5733, 5734, 5760, 6038, 6254, 9151-9152, 9645-9647, 9648, 9804, 9863, 9998, 10701 (1936).

court admitted in evidence charts purporting to show defaults in the payment of taxes. These charts had been prepared by an accountant, a witness for the prosecution. They were made in the regular course of business, although made in preparing evidence for trial. Judge Clark wrote the opinion. In the present case he says:

> "Since the first cave man made notches on a stick, I had supposed that both the purpose and the value of records were their use in future disputes—to prevent many, to settle others. As a matter of fact, this very argument was considered at length and rejected on the authorities by us in *United States* v. *Mortimer, supra*" (R. 479).

Reed v. *Order of United Commercial Travelers*, 123 F. (2d) 252 (C. C. A. 2d, 1941), held that a hospital case record was admissible which read in part "Was reacting very well—still apparently well under influence of alcohol." It was pointed out in the *per curiam* opinion (joined in by Judge Frank) that the surgeon's statement was a diagnosis, was an "act, transaction, occurrence, or event" within the meaning of the statute, 28 U. S. C. §695.

Cases under similar statutes.

The Circuit Court of Appeals for the Second Circuit, in *Gelbin* v. *New York, N. H. & H. R. Co.*, 62 F. (2d) 500 (1933), held admissible under Section 374-a of the Civil Practice Act of New York (set out in Appendix, *infra*, p. 34; derived from the 1927 Model Act) a record made by an employee of the State Department of Public Works whose duty it was to paint a highway sign. The condition of the sign was in issue and the employee was responsible for its condition.

The case of *Needle* v. *New York Railways Corporation*, 227 App. Div. 276 (1st Dep't 1929), *aff'd*, 256 N. Y. 616 (1931), was a personal injury action under Section 374-a

of the Civil Practice Act. Defendant offered in evidence a police blotter which contained a report of a police officer. The police officer did not see the accident but based his report upon statements made to him by third parties, including the motorman of defendant's trolley car. The police officer's report contained the statement "Responsibility Pedestrian". The Appellate Division held that it was error to admit the blotter in evidence because (1) the statements made to the police officer were not made by any person in the regular course of any business (this would include the motorman), and (2) the statement of the motorman was a conclusion, and unreliable because of interest. Substantially, the opinion merely reads into the statute the requirement that the original report must be made in the regular course of business. (1930) 43 Harvard Law Review 960, 961. The motorman's statement was an expression of opinion, not made in the regular course of business. In pointing up the language of the opinion as to motive Judge Frank has hung too much on too little (R. 452-453, 458-461).

Section 695 is not borrowed from New York but from the Model Act. *Ulm* v. *Moore-McCormack Lines*, *supra*, 115 F. (2d) 492, 495. In construing Section 695, the interpretation of Section 374-a by New York courts is persuasive only if reasonable.

Substantially similar statutes have been construed liberally. Ch. 535, Massachusetts Laws of 1898, provided:

> "No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant."

In *O'Driscoll* v. *Lynn & Boston Railroad*, 180 Mass. 187 (1902), a personal injury action, the railroad put in evidence, under the above statute, a statement of their doctor

who died prior to the suit, and who had made an examination after the accident. In an opinion by Holmes, *C. J.*, the statement was held to be admissible and to have met the requirements of the statute, including that of "good faith."

In *Nagle* v. *Boston & Northern Street Ry.*, 188 Mass. 38 (1905), the trial court allowed in evidence declarations of deceased motorman as to an order he received, in an action by the administratrix of his estate. The Supreme Judicial Court held the declarations were properly admitted under R. L. c. 175, §66 (set out in Appendix, *infra*, p. 34), and that the weight and inferences to be drawn from the evidence were for the jury.

In *Chaput* v. *Haverhill, Georgetown, etc. Ry.*, 194 Mass. 218 (1907), under the same statute as that in the *Nagle* case, plaintiff's deceased suffered injuries from which he died, and it was held that his declarations were admissible, notwithstanding there was no opportunity to cross examine.

In *American Ry. Express Co.* v. *Rowe*, 14 F. (2d) 269 (C. C. A. 1st, 1926), *cert. denied*, 273 U. S. 743 (1927), an action to recover damages for conscious pain and suffering and death, it was held that statements made by the deceased to an attorney (later appointed executor), while in a hospital, after the accident, were admissible, under Mass. Gen. Laws (1932) c. 233, §65 (formerly R. L. c. 175, §66).

Referring to the same statute as in the *American Ry. Express Co.* case, Chief Justice Rugg, in *Matter of Keenan*, 287 Mass. 577 (1934), says:

> "This statute made a considerable change in the law of evidence. It requires declarations or statements to be received which under the common law were excluded because obnoxious to the rule against hearsay

evidence. It was designed to remedy a defect in the law of evidence as theretofore administered. It ought to be and has been consistently construed liberally to extend rather than to restrict the intended relief and to effectuate its corrective purpose" (pp. 580, 581).

The Committee of the Commonwealth Fund prepared The Law of Evidence: Some Proposals for Its Reform, *supra*. One chapter discusses the admission of the declarations of deceased and insane persons (pp. 37-49). It quotes c. 535, Acts of Mass., 1898, *supra*, and a similar provision in then c. 233, §65, Mass. Gen. Laws (p. 39), and recommends the adoption of a substantially similar statute as to declarations by a deceased or insane person in all jurisdictions (pp. 48, 49). In another chapter of the same report the Committee recommends a statute covering entries in the regular course of business (p. 63). With the Massachusetts law settled as to the interpretation of the statutes relating to the declarations of deceased and insane persons, that motive affects the weight, not the admissibility, it would appear that the Committee expected the same interpretation for both proposed statutes.

The case of *Lyman B. Brooks Co.* v. *Wilson*, 218 Mass. 205 (1914), was an action to recover money claimed to be due plaintiff. Ch. 288 of the Laws of 1913[3] provided: "* * * an entry in an account kept in a book * * * shall not be inadmissible in any civil proceeding as evidence of the facts therein stated because * * * it is hearsay or self-serving, if the court finds that the entry was made in good faith in the regular course of business and before the beginning of the civil proceeding aforesaid." The opinion says:

"This is an exception to the general rule as to the admissibility of self-serving statements made by a

[3] This is a predecessor to present c. 233, §78, Mass. Gen. Laws (1932), the Massachusetts statute which followed the Model Act of 1927 (see *supra*, n. 1, p. 14).

party to an action in court. * * * What weight should be given to evidence of this kind in view of the general rule of the common law, is for the jury or the judge (if the case is tried without a jury) to decide. But the evidence has been made competent by the statute and cannot be objected to if offered in evidence" (p. 209).

Liberal interpretation—modern trend.

The liberal interpretation adopted by Judge Clark and urged by petitioners is in line with the modern trend in the law of evidence. Petitioners have already referred to the Model Act of 1927. After the Model Act came the Federal Act of 1936, 49 Stat. 1561, 28 U. S. C. §695, derived from it. In 1936 the Commissioners of Uniform State Laws proposed the Uniform Act, adopted in twelve jurisdictions.[4] Finally, the American Law Institute has brought out a Code of Evidence (1942) and we refer particularly to Rule 514 (set out with Comment in Appendix, *infra*, p. 36). Rule 514 closely resembles Section 695. The Comment makes clear that under this Rule the question of motive has no effect upon the question of admissibility. Some of these proposals and statutes are reviewed in 5 Wigmore, Evidence, *supra*, §1520, and in Legis. (1934) 47 Harvard Law Review 1044-1054.

The modern trend of liberal interpretation is also emphasized by Federal Rule 43 (a), 28 U. S. C., following §723c (set out in Appendix, *infra*, p. 33). *Ulm* v. *Moore-McCormack Lines*, *supra*, 117 F. (2d) 222, 224. *See* 3 Moore, Federal Practice (1938) 3060.

[4] Cal. Code Civil Proc. (Deering, 1941) §§1953e-h; Hawaii Laws 1941, c. 109; Idaho Code Ann. (Anderson & Green, Supp. 1940) §16-401A; Minn. Stat. (1941) §§600.01-.04; Mont. Rev. Codes Ann. (Darlington, Supp. 1939) §§10576.1-.5; N. D. Laws 1937, c. 194; Ohio Code Ann. (Throckmorton, 1940) §§12102-22 *et seq.*; Ore. Comp. Laws Ann. (Supp. 1941) §§2-819 *et seq.*; Pa. Stat. Ann. (Purdon, Supp. 1942) tit. 28, §§91a-d; S. D. Code (1939) §36.1001; Vt. Laws 1939, no. 48; Wyo. Laws 1941, c. 82.

Analysis of the terms of the statute, examination of its general background and legislative history, recognition of the modern trend toward liberal interpretation, make clear that this decision unreasonably limits the field of operation and defeats the very purpose of the statute.

POINT II.

Under the Federal Rules of Civil Procedure and under the Conformity Act, Rev. Stat. §914 (1875), 28 U. S. C. §724 (1940), it was reversible error to hold that, if petitioners' attorney inspected a statement made by respondent's witness, respondent could put the statement in evidence.

Petitioners have shown the circumstances under which the trial judge ruled that if petitioners' attorney called for and inspected a statement signed by respondent's witness, Laurence Bona, it would be admissible in evidence for respondent; that the Circuit Court of Appeals unanimously ruled that this was erroneous; but that the majority opinion held it was not reversible error (*supra*, pp. 3, 4).

According to the opinion the decision of the trial judge was contrary to "liberal pre-trial discovery" (R. 471), and could not be "reconciled with the liberality as to depositions and discovery contained in the new Rules" (R. 473), particularly Rule 26(b) (set out in Appendix, *infra*, p. 32).

The majority opinion of the Circuit Court of Appeals says the error of the trial judge is not reversible for two reasons: (1) the statement, not in the record, might not impeach, and (2) the trial judge was not unreasonable in relying upon an old equity case (R. 473, 474). Petitioners submit that neither reason is adequate.

Under Rule 26 (b) deponent may be examined regarding any relevant matter, including documents. The en-

phasis is placed on the examination, permitted whether or not the writing serves as a basis for impeachment and whether or not such impeachment will materially affect the jury's verdict. The right is the right of examination.

The conclusion of the majority that the admitted error of the trial judge was not reversible also fails to consider that part of Rule 26 (b) which reads that deponent may be examined regarding any matter relevant to the subject matter "whether relating to the claim or defense of the examining party, or to the claim or defense of any other party". *See* 3 Ohlinger, Federal Practice (1939) 450. Discovery is no longer limited to facts supporting the case of the party seeking it. 2 Moore, Federal Practice, *supra*, 2439. The district courts have recognized that one party may inquire into the case of the other party. *Nichols* v. *Sanborn Co.*, 24 F. Supp. 908, 910 (D. Mass. 1938); *Newcomb* v. *Universal Match Corporation*, 25 F. Supp. 169, 171 (E. D. N. Y. 1938); *Dixon* v. *Sunshine Bus Lines*, 27 F. Supp. 797 (W. D. La. 1939).

Rule 34 (set out in Appendix, *infra*, p. 32) provides that upon motion the court may order a party to produce and permit the inspection of any designated document, which contains material evidence, not privileged, in the possession of the party. The Rule may be used before or at the trial. The right of inspection is independent of the question of impeachment.

The opinion of Judge Frank says that the court refuses to reverse because the statement is not before it (R. 473, 474). He recognizes liberality as to deposition and discovery, but immediately restricts the ruling. Petitioners submit that the liberality should include the right of examination, not merely the right of examination of a paper which would lead to such impeachment of a witness as materially to affect the jury's verdict. Such limited right would always depend on the contents of the paper.

The opinion also says that the trial judge should have dealt with the request as if it had arisen under Rule 26(b), but the court would not reverse because, among other reasons, the trial judge did not act unreasonably in relying upon an equity case (R. 474). This is an unusual ground of affirmance of an erroneous ruling.

The Conformity Act (Rev. Stat. §914 (1875), 28 U. S. C. §724 (1940); set out in Appendix, *infra*, p. 33) may well come into play on the theory that literally neither Rule 26(b) nor Rule 34 is applicable to the situation. The Conformity Act would require the adoption of the New York rule as to inspection of documents, which allows unqualified right of inspection, free from any such conditions as have been imposed. *Smith* v. *Rentz*, 131 N. Y. 169 (1892) and cases cited therein.

In *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 10 (1941), a case involving the validity of Rules 35 and 37, the majority opinion says that the Rules repealed the Conformity Act, but petitioners respectfully submit that the Act, while largely superseded, still has force when not in conflict with the Rules. See Enabling Act of June 19, 1934, c. 651, §§1, 2; 48 Stat. 1064 (1934); 28 U. S. C. §723b, c (1940) (set out in Appendix, *infra*, p. 31); and Green, *The Admissibility of Evidence under the Federal Rules* (1941) 55 Harvard Law Review 197, 204.

If the new Rules cover the entire field of civil procedure, the decision of the trial court constitutes reversible error. If the Conformity Act is applicable, because the Rules are not deemed to cover the right of inspection during the trial, the decision of the trial court likewise constitutes reversible error.

POINT III.

In the personal injury action the respondent had the burden of proving freedom from contributory negligence.

The trial court charged that the petitioners had the burden of proving contributory negligence (R. 387). Petitioners excepted to this part of the charge and to the failure to charge Request No. 16 that in the personal injury action respondent had the burden of proving freedom from contributory negligence (R. 394, 395, 403).

The Circuit Court of Appeals admits that it would turn to the decisions of the New York courts, including those relating to conflict of laws, if it were to reject Federal Rule of Civil Procedure 8(c) (R. 475; Rule 8(c) set out in Appendix, *infra*, p. 31). Judge Frank refuses to decide whether the Rule should be disregarded because burden of proof is a matter of substance, on the theory that under the Rule and under the New York law the result is the same (R. 475). Petitioners' position is that Rule 8(c) does not apply, and that the New York conflicts law places the burden of proof upon the respondent.

From *Swift* v. *Tyson*, 16 Pet. 1 (1842) to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), the federal courts treated burden of proof of contributory negligence as a matter of substantive general law. In *Erie R. Co.* v. *Tompkins*, the plaintiff sued in the United States District Court for the Southern District of New York for injuries received in Pennsylvania. This Court held that the state substantive law of Pennsylvania was applicable, but did not say whether this was so by virtue of New York conflicts law or because of a general conflicts rule which would look to the *lex loci delicti*. In *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487 (1941), this Court held that the federal court should follow the conflicts rule of the state where it is sitting.

because conflict of laws rules are within the sphere of substantive law.

The aim of *Erie R. Co. v. Tompkins, supra*, was to produce a conformity of result between actions brought in the state and federal courts. Applying this rationale to the case at bar, New York law should govern in a case in the federal court sitting in New York. *See* opinion of Judge Magruder in *Sampson v. Channell*, 110 F. (2d) 754 (C. C. A. 1st, 1940), *cert. denied*, 310 U. S. 650 (1940), which case was approved in *Klaxon Co. v. Stentor Co., supra*, 313 U. S. 487, and in *Griffin v. McCoach*, 313 U. S. 498 (1941). We have here a diversity of citizenship case, brought in the federal court sitting in New York, for damages on account of an accident in Massachusetts. It involves the rule of New York as to conflict of laws. New York is free to determine whether a given matter is governed by the law of the forum or by some other law. The federal court usually does not make an independent determination in the field of conflict of laws. These general principles, growing out of *Erie R. Co. v. Tompkins, supra*, are of importance in the consideration of Federal Rule 8(c).

Petitioners submit that Federal Rule 8(c) does not apply. In the first place, it expressly refers to a rule of pleading. *Sampson v. Channell, supra*, 110 F. (2d) 754, 757; followed in *Fort Dodge Hotel Co. v. Bartell*, 119 F. (2d) 253, 258, 259 (C. C. A. 8th, 1941). In the second place, it does not apply because a long line of federal decisions holds that the matter of burden of proof as to contributory negligence is not procedural but concerns substantive rights—substantive in the sense of importance in the determination of a case. *Sampson v. Channell, supra*, 110 F. (2d) 754, 755; *Garrett v. Moore-McCormack Co.*; 11 U. S. L. Week 4057, 4059 (U. S., December 14, 1942). In *Cities Service Co. v. Dunlap*, 308 U. S. 208 (1939), this Court held that a federal court should follow

the state rule on burden of proof when it relates to a substantial right. The Enabling Act of June 19, 1934, *supra*, recognizes this principle in providing that the Rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant". The Act is restricted to matters of pleading and court practice and procedure. *Sibbach* v. *Wilson & Co.*, *supra*, 312 U. S. 1, 10.

While a sharp conflict has developed between *Erie R. Co.* v. *Tompkins*, *supra*, 304 U. S. 64, and the Federal Rules (see Note [1938] 38 Columbia Law Review 1472, 1478), from a policy point of view conformity—the underlying principle of *Erie R. Co.* v. *Tompkins*, *supra*—would be best served by limiting Rule 8(c) to pleading, and not including burden of proof as to contributory negligence.

The New York conflicts law places upon the respondent the burden of proving freedom from contributory negligence. Petitioners confine their examination of the New York cases to the conflict of laws decisions, rather than to the purely internal law decisions. For this approach see Cheatham, Book Review (1941) 55 Harvard Law Review 164, 166.

Geoghegan v. *The Atlas Steamship Co.*, 3 Misc. 224 (1893), *aff'd*, 146 N. Y. 369 (1895), was an action brought by plaintiff, as administratrix, for defendant's alleged negligence in a foreign port, resulting in the death of plaintiff's intestate. The court held that the rights of the parties were determined by the law of the place of injury but that "the law of the forum regulates the burden of proof (of freedom from contributory negligence) and the quantum of evidence requisite to a recovery" (p. 227).

In *Wright* v. *Palmison*, 237 App. Div. 22 (2d Dep't 1932), the plaintiff, injured in Massachusetts, sued for damages based upon negligence. Defendants appealed from a judgment for the plaintiff on the ground that the burden of proof as to contributory negligence was

erroneously placed on them. The Appellate Division reversed the judgment, holding that in an action brought in New York, the New York courts follow the burden of proof rule in force in that state. The Court said, at page 22:

> "Proof of freedom from contributory negligence must be forthcoming from the plaintiff in an action for damages based upon the negligence of the defendant, and even though defendant's negligence is determined by the law of the State where the accident occurred, as a matter of substantive right, the rule governing proof of freedom from contributory negligence is a matter of procedure, and the burden of establishing it is to be applied in an action tried in our courts in accordance with the law of this State. (*Sackheim* v. *Piguerou*, 215 N. Y. 62; and see *Fitzpatrick* v. *International R. Co.*, 252 id. 127, 134, 135.)"

See Goodrich, Conflict of Laws (1938) 200, citing *Wright* v. *Palmison*, *supra*.

Wright v. *Palmison*, *supra*, was followed in *Clark* v. *Harnischfeger Sales Corporation*, 238 App. Div. 493 (2d Dep't 1933). Suit was brought for damages on account of personal injuries arising out of an accident in Pennsylvania. It was held that proof of freedom from contributory negligence was governed by New York law, not by that of Pennsylvania.

Section 601, Restatement, Conflict of Laws (1934), reads as follows:

> "FREEDOM FROM FAULT.
>
> "If the law of the forum makes it a condition of maintaining an action that the party bringing the action show himself free from fault, the condition must be fulfilled though there is no such requirement in the state where the cause of action arose."

Judge Frank says (R. 475) that the New York courts, in a case such as this, would apply, as a matter of conflict of laws, the Massachusetts law, citing *Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127 (1929). That was a personal injury action brought in New York, but based solely on the Ontario Contributory Negligence Act (set out in Appendix, *infra*, p. 35). By New York law, there is no recovery for a plaintiff in a personal injury action who is guilty of contributory negligence. The trial judge had charged that the burden of proving contributory negligence was on the defendant pursuant to the Ontario statute. Sustaining that charge, the Court of Appeals said:

> "As we have said, the Ontario act goes beyond a matter of procedure and gives a right unknown to the common law, the right of an injured person to recover for another's negligence, even though contributing by his own neglect to bring it about. For these reasons the trial court was quite correct in charging the jury in accordance with the Ontario statute" (p. 135).

And as to New York law:

> "The law of the State of New York has no application under such circumstances; it is impossible of application. As a mere matter of procedure, the plaintiff here must prove his freedom from contributory negligence but if in his proof he fails to establish his freedom from contributory neglect or shows that he was neglectful, his complaint must be dismissed. He has no cause of action" (pp. 134, 135).

The Court of Appeals applied a foreign *substantive* right which granted a recovery to one guilty of contributory negligence. 3 Beale, Conflict of Laws (1935) 595.1, 595.3; Note (1941) 26 Washington University

Law Quarterly 244, 247-248. In *Jarrett* v. *Wabash Ry. Co.*, 57 F. (2d) 669, 671 (1932), *cert. denied*, 287 U. S. 627 (1932), a case involving the same Ontario statute as in the *Fitzpatrick* case, the Circuit Court of Appeals for the Second Circuit held that such statute created a substantive right, and cited that case to that effect. There is, then, nothing in the *Fitzpatrick* case contrary to the view that as a rule of conflict of laws, New York regards the burden of proving freedom from contributory negligence as a matter of procedure, and applies its own law. On the other hand, the intimation in that case to the effect that if a substantive right had not been involved, the decision would have been the other way (252 N. Y. 127, 135), is in complete accord with the position taken by petitioners.

In brief, Rule 8(c) is not applicable, and, in the personal injury action, respondent had the burden of proving freedom from contributory negligence, by virtue of New York conflict of laws decisions.

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court of Appeals for the Second Circuit should be reversed.

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Appendix.

Statutes Involved.

Enabling Act of June 19, 1934, c. 651, §§ 1, 2; 48 Stat. 1064 (1934); 28 U. S. C. § 723b, c (1940), reads as follows:

> "The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.
>
> "The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however*, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

Rule 8 (c), Federal Rules of Civil Procedure, 28 U. S. C. following § 723c (1940), reads as follows:

> "Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, as-

sumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

Rule 26 (b), Federal Rules of Civil Procedure, 28 U. S. C. following (723c (1940), reads as follows:

"Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts."

Rule 34, Federal Rules of Civil Procedure, 28 U. S. C. following (723c (1940), reads as follows:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the

action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

Rule 43 (a), Federal Rules of Civil Procedure, 28 U. S. C. following §723c (1940), reads as follows:

"Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

Conformity Act, Rev. Stat. §914 (1875); 28 U. S. C. §724 (1940), reads as follows:

"Conformity to practice in State courts. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and

modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

Section 66, Chapter 175, Revised Laws of Massachusetts, reads as follows:

"A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."

Section 29, Chapter 159, General Laws of Massachusetts (1932), reads as follows:

"An inspector shall, under the direction of the department, investigate as promptly as may be any accident upon a railroad or railway, or resulting from the operation thereof, which causes the death or imperils the life of any person, and shall report thereon to the department, which shall investigate the cause of any such accident resulting in loss of life, and may investigate any other accident. The inspector shall attend the inquest held in case of any such death by accident and may cause any person who has knowledge of the facts or circumstances connected with such death to be summoned as a witness to testify at the inquest."

Section 374-a, New York Civil Practice Act, reads as follows:

"ADMISSIBILITY OF CERTAIN WRITTEN RECORDS. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge

shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."

Ontario Contributory Negligence Act, Chapter 32, Laws of Ontario (1924), reads as follows:

"3. In any action or counterclaim for damages hereafter brought, which is founded upon fault or negligence, if a plea of contributory fault or negligence shall be found to have been established, the jury, or the judge in an action tried without a jury, shall find:

"*First*: The entire amount of damages to which the plaintiff would have been entitled had there been no such contributory fault or neglect;

"*Secondly*: The degree in which each party was in fault and the manner in which the amount of damages found should be apportioned so that the plaintiff shall have judgment only for so much thereof as is proportionate to the degree of fault imputable to the defendant.

"4. Where the judge or jury finds that it is not, upon the evidence, practicable to determine the respective degrees of fault the defendant shall be liable for one-half the damages sustained."

Rule 514, American Law Institute Code of Evidence (Temporary Pamphlet Edition, 1942), reads as follows:

"Business Entries and the Like.

"(1) A writing offered as a memorandum or record of an act, event or condition is admissible as tending to prove the occurrence of the act or event or the existence of the condition if the judge finds that it was made in the regular course of a business and that it was the regular course of that business for one with personal knowledge of such an act, event or condition to make such memorandum or record or to transmit information thereof to be included in such a memorandum or record, and for the memorandum or record to be made at or about the time of the act, event or condition or within a reasonable time thereafter.

"(2) Evidence of the absence of a memorandum or record of an asserted act, event or condition from the memoranda or records of a business is admissible as tending to prove the non-occurrence of the act or event or the non-existence of the condition in that business, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events, or conditions at the time thereof or within a reasonable time thereafter, and to preserve them.

"(3) The word business as used in Paragraphs (1) and (2) includes every kind of occupation and regular organized activity, whether conducted for profit or not.

Comment:

"This Rule is based upon the Act recommended by the Commonwealth Fund Committee, which has been enacted by Congress and has been adopted substantially verbatim in New York and with some

modifications in a few other states. The Rule differs from the Commonwealth Act in a few particulars: First, it applies not only to acts and events but also to conditions. Second, it includes as a business, every kind of institution, and makes it clear that conduct for profit is not essential to a business. Third, it clearly provides that the person having knowledge of the act, event or condition, either must make the memorandum or must in the course of the business transmit the information for inclusion in the memorandum. The New York Statute, which adopted the Commonwealth proposal, contains no provision requiring personal knowledge by one acting in the regular course of business, but the New York Court of Appeals interpreted it as if it had contained such a provision. In *Johnson* v. *Lutz*, 253 N. Y. 124, 170 N. E. 517, a policeman, who in the regular performance of his duties, investigated an accident which he had not witnessed, made a report thereon based upon statements made to him by persons who claimed to have seen the accident. The report was made in the regular course of the policeman's business, but it was no part of the business of the witnesses of the event either to make the report or to transmit the information for inclusion in a report. The court held the report inadmissible. The decision has been severely criticized on the ground that the statute, like the Commonwealth proposal, requires only that the report be made in the regular course of business, and expressly stipulates that lack of personal knowledge by the writer shall not cause its exclusion but shall affect only its evidential weight. This criticism will lose much of its force if Rules 503 and 529 are accepted, for if the declarant who perceived the event is unavailable, evidence of his statement is admissible under those Rules, if he is available it will work no hardship to require the pro-

present to call him. It must be noted, however, that neither this requirement that one with personal knowledge make the memorandum or transit the information in the regular course of business, nor any other requirement necessitates either any showing or finding as to the interest or lack of interest or motives of the transmitter of the information or of the entrant or recorder, or the calling of any specified persons as witnesses. The judge must make the preliminary findings from admissible evidence; but any witness acquainted with the regular course of the business may testify concerning it. All the judge need find as to the particular writing is that it was made in the regular course of a business; in addition he must find that the regular course of that business complied with requisites of the Rule; only these and nothing more. All common law qualifications and restrictions are abolished. He need make no formal finding; his ruling admitting the writing carries in it the finding of the facts to support it. Fourth, the Rule makes evidence of absence of a memorandum receivable to show the non-occurrence of an act or event or the non-existence of a condition.

"In many cases it would be possible to lay a foundation which would make the entries admissible under Rule 303; but under the present Rule neither personal knowledge of the entrant nor his unavailability need be shown.

"The evidence is admissible wherever relevant. None of the restrictions of the common law shop book rule is applicable."